TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 123.

THE FIRST NATIONAL BANK OF ALBUQUERQUE, APPELLANT,

vs.

GEORGE F. ALBRIGHT, FRANK A. HUBBELL, AND F. W. CLANCY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED OCTOBER 2, 1906.

(20,399.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1907.

1 Be it remembered, that heretofore, on to-wit on the twenty-seventh day of May, in the year of, our Lord one thousand nine hundred and five, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a transcript of record, in a certain cause therein docketed and Numbered 1097, entitled, First National Bank of Albuquerque, appellee, *vs.* George F. Albright, Frank A. Hubbell, and Frank W. Clancy, which said transcript of record, so filed, was and is in figures, following to wit:—

2 In the Supreme Court of the Territory of New Mexico.

Transcript of Record.

Case No. 1097.

Appeal from Bernalillo County.

First National Bank of Albuquerque
vs.
George F. Albright, Frank A. Hubbell, — Frank W. Clancy.

January Term, A. D. 1906.

Be it remembered, That heretofore, to-wit, on the 7th day of September, 1904, there was filed in the office of the Clerk of the District Court of the Second Judicial district of the Territory of New Mexico, within and for the County of Bernalillo, a bill of complaint
3 in a certain cause wherein the First National Bank of Albuquerque was the complainant, and George F. Albright, Frank A. Hubbell and Frank W. Clancy were defendants, which said bill of complaint is in the words and figures following, to-wit:

In the District Court of the County of Bernalillo, Territory of New Mexico.

No. 6640.

First National Bank of Albuquerque, Plaintiff,
vs.
Geo. F. Albright, Frank A. Hubbell, and Frank W. Clancy, Defendants.

Complaint.

Comes now the said plaintiff and complains of said defendants and alleges:

I.

The plaintiff is a corporation, duly organized under the laws of the United States, and doing business under provisions of the Na-

tional Banking Act, in the City of Albuquerque, County and Territory aforesaid.

II.

The defendant, Geo. F. Albright, is the duly elected, qualified and acting Assessor of said county.

III.

The defendant Frank A. Hubbell is the duly elected, qualified and acting Treasurer and *ex-officio* Collector of said county.

IV.

The defendant Frank W. Clancy is the duly appointed, qualified and acting District Attorney of the Second Judicial District, comprising with other counties, said County of Bernalillo.

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V.

On the 30th day of April, 1903, the said plaintiff through M. W. Flourney, its vice president and manager, then and there intending to submit for assessment the list of all the shares of stock of said bank, in compliance with Chapter 40, of the laws of 1891, insofar as it did not conflict with said banking act, furnished to the said Albright, who was then and there the Assessor of said county, the following list and valuation, to-wit:

"Capital stock, surplus and real estate, both inclusive. Lots 47 to 53, block 50; south 105½ feet lots 13 to 14, block 16; lot 24, block 8; lot 15, of block 14; lot 18, of block 20, and lots 9 and 10 of block 21 of the New Mexico Town Company's addition to Albuquerque. Also lots 1 to 4, of block 16 of the Perea addition to Albuquerque. Also lots 68 and 69, of block 7, of the P. Armijo and Brothers' addition to said city, and lots 1, 2, 3 and 4, of block 9. Also a tract of land 50 by 88 feet of block 14 of the F. Armijo y Otero addition; also lots 22 and 23, of block A, of the Springer addition; also two pieces of land in precinct 28, 400 by 800 yards, and 65 by 1,900 yards; also an undivided interest in the Salada Grant, aggregating the total value of $90,000.00.

VI.

That thereafter, on the 2d day of June, 1903 the said Albright, acting under the directions of the Board of County Commissioners of said County, raised and changed said assessment as follows, to-wit:

Capital stock, $200,000 at 60 per cent	$120,000.00
Surplus, March, $24,634, at 60 per cent	16,422.00
Included in capital stock, N. M. & Co., lots 13-14, block 16.	
N. M. T. Co., lots 47 to 53, block 50	350.00
" lot 24, block 8	10,000.00

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" lot 15, block 14	200.00
" lot 18, block 20	200.00
" lots 9-10, block 21	400.00

Perea, lots 1-2-3-4, block 16	300.00
P. Armijo Bros., lots 68-69, block 7	150.00
F. Armijo, lots 1-2-3-4, block 9	500.00
Ry. frontage, 50 x 80, F. Armijo, block 14	250.00
Springer, lots 22-23, block A	300.00
Land in precinct 28 400 x 800 yds., about 69 acres, at $5	345.00
Land in precinct 28, 65 x 1,900 yds., about 25 acres, at $5	125.00
Fixtures in Zieger building	1,000.00
Total assessed valuation	$150,542.00

VII.

Plaintiff further alleges that while the return of said plaintiff was not in strict accordance with the provisions of Chapter 40, above mentioned, that the return was made in that form because of the direction of the Territorial Board of Equalization, that the value of the shares of stock of banks should be made upon the basis of the total capital stock and surplus, and because of the provisions of said chapter 40, that if the real estate was separately assessed and valued, the assessed value should be deducted from the valuation of the shares of stock, and the return of said plaintiff giving the amount of shares of stock surplus and of all its real estate holdings in one valuation was intended to furnish the basis of assessing the shares of stock and real estate of said bank subject to taxation under the provisions of said chapter 40, and was so understood and acquiesced in by the taxing officers, and had been the custom for years.

Plaintiff further alleges that from the foregoing change and raise in its assessment, it appealed to the Board of County Commis-
6 sioners, who refused to grant plaintiff any relief, and thereupon said plaintiff appealed to the said Territorial Board of Equalization, which also refused to grant relief, and plaintiff alleges that the objections to said assessment before said Board of County Commissioners and upon appeal to said Territorial Board of Equalization was based among other things upon the fact that while the assessor of said county and said Board of County Commissioners had established the rule and adopted as a general basis for the assessment of all real estate and personal property of other individuals and corporations the value of one-third of the real value of the property assessed as the assessed valuation, that said assessor and said board had assessed said bank upon the basis of 60 per cent., and because said assessing officers neglected and refused to deduct from the valuation of the stock of said bank the assessed value of the real estate of said bank, and that if the same rule of valuation was adopted for said bank as for other property in said county, that the total valuation would not exceed $74,878.00, and because none of said taxing officers above referred to or Boards of Equalization, had any right, power or authority to adopt a basis for valuing bank property different from the basis adopted for the valuation of the property of other corporations or individuals.

Plaintiff further alleges that said basis of valuation of 60 per cent. of the capital stock and surplus of banks was determined beforehand by the Territorial Board of Equalization without consideration or evidence, and is an arbitrary rule established by said board without authority of law and without evidence and without consideration of the value of the property of said plaintiff or other banks, and said plaintiff was at all times hereinbefore and hereinafter referred to without remedy before any of said taxing
7 officers of Board of Equalization because of the rule of said Territorial Board of Equalization determined by them before the hearing and which they and their subordinate taxing officers declare they were bound to follow.

VIII.

Afterwards said plaintiff duly paid at the time fixed by law for the payment of taxes, the sum of $5,224.50, being the amount conceded to be due, which said sum was the full amount of the taxes and charges against the shares of stock and real estate of the plaintiff, according to the valuation made in the return of said plaintiff, and the sum so paid was duly assessed and charged by said plaintiff against its several shareholders, as provided by statute, in said Chapter 40, above mentioned. And plaintiff is advised by counsel and therefore charges that the said return of said bank was a substantial compliance with the law, and furnished substantial basis for the valuation of the shares of stock and real estate of said bank; that the manner of return was acquiesced in by the taxing officers and that by the payment of the full amount of taxes which would have been due, according to said return, that the taxing power of the taxing officers hereinbefore referred to, was wholly exhausted, and that they have no right, power or authority to make re-assessments as threatened by said district attorney.

IX.

Afterwards, on the 13th day of July, 1904, the defendant, Frank W. Clancy, commenced suit as district attorney in the district court of the County of Bernalillo aforesaid, in the name of the Territory of New Mexico, and against said First National bank of Albuquerque, being cause numbered 6603, for collection of taxes claimed to be due on account of said raise and change of said assessor for
8 the sum of $3,690.18, being the amount of taxes, according to the valuation by said Assessor, $8,738.96, less said sum of $5,224.50 so paid by plaintiff, and including a penalty of 5 per cent. for non-payment of said balance. And thereupon on demurrer interposed by said plaintiff, the said district attorney refused to allow judgment to be entered thereon or to have said tax in excess of plaintiff's return declared to be illegal and void, but on the contrary, dismissed said suit, and gives it out and threatens that he will cause said Assessor or said Collector to reassess all the real estate of the said plaintiff and all of the personal property above described and all the shares of stock of said bank, and that he will cause the shares of stock of said bank to be valued at 60 per cent. of the capital stock and surplus of said bank, under an alleged

direction from the Territorial Board of Equalization, without deducting from the value of said stock the assessed value of the real estate of said bank, and *and* the said district attorney claims the right to direct said officers in the exercise of their authority in the assessment of said property, and to arbitrarily reassess said property without disposing of the prior assessment. And plaintiff is informed and believes that said Treasurer and *ex-officio* Collector and said Assessor will obey the direction of said district attorney, and make said re-assessment and attempt to collect the alleged taxes resulting from said re-assessment.

X.

Plaintiff further alleges that it is advised by counsel, and therefore believes, that the personal property of said bank is not subject to taxation; that if said real estate should be assessed separately, the assessed value thereof should be deducted from the assessed value of the stock of said plaintiff, and that the stock of said plaintiff cannot be legally assessed at a higher rate than other property within said territory.

XI.

Plaintiff further alleges that said Albright was the Assessor at all times mentioned in this complaint, and that upon assuming his office as Assessor in the year 1903, he laid down and fixed and announced as his method of valuation, that all property except bank property and shares of stock in banks would be as -ed on a uniform basis of one-third of its real value, but that because of the direction of the Territorial Board of Equalization, he would assess banks on the basis of 60 per cent. of the capital stock and surplus, in addition to the real estate of said banks, and the said plaintiff alleges that the said Albright as his Assessor, did thereupon adopt and enforce as a general rule for valuation of property within his county the aforesaid basis of valuation, and did thereupon for the said year, 1903, assess all property other than property of banks and shares of stock in banks at one-third of its real value, and did then and there for said year 1903 assess banks at 60 per cent. of their capital stock and surplus, and also the real estate of said banks without deducting the value thereof from the valuation of other property assessed against said banks, and did then and there for said year 1903, assess the plaintiff as more particularly set forth in paragraph VI. of this complaint.

Plaintiff further charges that the said Territorial Board of Equalization and said Frank W. Clancy, as district attorney, usurped the powers and privileges of the taxing officers of said county and in violation of law, direct and command said officers to make assessments as above set forth without the exercise of the judgment and discretion vested in them by law in the valuation of property generally, and said officers, the Collector and *ex-officio* Treasurer and said Assessor, believing that they are subject to the order and direction of said Territorial Board of Equalization, and of said district attorney, are ready and willing to make any assess-

ment directed by said officers or any of them, and will make said threatened re-assessment unless restrained by order of this court.

XII.

Plaintiff further alleges that said assessment stands as a cloud against plaintiff's real estate, and insofar as it remains unpaid, and is wholly void and unauthorized by law; that the valuation contained in plaintiff's return is in excess of one-third of the value of all the shares of stock of said bank; that any additional assessment or re-assessment would be wholly in excess of the valuation fixed in the assessment of all other classes of property and would be entirely void. And plaintiff is advised by counsel and charges that under the provisions of law of the Territory of New Mexico, the valuation of all property subject to assessment, without regard to its kind or character, is required to be assessed upon a uniform basis; that under the provisions of the National Banking Act, said bank cannot be taxed directly or indirectly except upon its shares of stock and real estate, and then only on the general basis as other property within said territory is assessed, and that by the provisions of said Chapter 40, if said real estate is assessed separately, the assessed value thereof must be deducted from the assessed value of said shares of stock.

XIII.

Plaintiff further alleges that it has always paid its taxes promptly, and is ready and willing at all times to pay its just share of the burdens of taxation, and that as above alleged, it has already paid more than its share of taxes for said year 1903 upon a just and reasonable valuation of its property subject to taxation, if
11 valued upon the same basis that other property was valued at in said County and Territory.

Wherefore, plaintiff prays that said Frank W. Clancy, as District Attorney, may be enjoined from directing, commanding or causing the said defendants Geo. F. Albright and Frank A. Hubbell, from assessing or re-assessing any of the property of said bank or its shares of stock for the year 1903; that the said defendants, Geo. F. Albright and Frank A. Hubbell be enjoined and forever restrained from assessing or re-assessing any of the property of said bank, including its *its* shares of stock for the year 1903; that the balance claimed to be due on account of the raise and change in the assessment of the property of said bank for the year 1903, be declared illegal and void, and that the said Frank A. Hubbell, as Treasurer and *ex-officio* Collector, be directed to cancel the same upon his books by order of this court, and for all such relief, as the plaintiffs may be entitled to in equity.

McMILLEN AND RAYNOLDS,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss:*

M. W. Flournoy, being first duly sworn, says that he is the Vice President and Manager of the First National Bank of Albuquerque, the above named plaintiff; that he has read the foregoing complaint and knows its contents; and that the same are true of his knowledge, except as to matters stated upon information and belief, and as to those he believes them to be true.

M. W. FLOURNOY.

Subscribed and sworn to before me this 7th day of September, 1904.

SAMUEL PICARD,
Notary Public.

[SEAL.]

12 Endorsed: "Filed in my office this September 7, 1904. W. E. Dame, Clerk."

And thereafter, to-wit, on the 19th day of October, 1904, there was filed in the office of the Clerk of said Court, in said cause, a Demurrer to the complaint, which said Demurrer is in words and figures following, to-wit:

In the District Court, County of Bernalillo, September Term, 1904.

No. 6640.

FIRST NATIONAL BANK OF ALBUQUERQUE, Plaintiff,
vs.
GEO. F. ALBRIGHT, FRANK A. HUBBELL, and FRANK W. CLANCY, Defendants.

Now come the said defendants, and say that the complaint of said plaintiff, and the matters therein set forth, are not sufficient in law for plaintiff to have and maintain its action against these defendants, and for grounds of demurrer, they specify the following:

1. The said complaint does not set forth facts sufficient to constitute a cause of action.

2. It appears from said complaint that plaintiff never made any legal or valid return, as required by Section 257, of the Compiled Laws of 1897.

3. Said complaint incorrectly asserts that, if plaintiff's real estate was separately assessed and valued, the assessed value should be deducted from the valuation of its shares of stock.

4. Said complaint sets up in the seventh subdivision thereof, an allegation of the understanding and acquiescence by taxing
13 officers, and a custom for years, which cannot be material or pertinent in support of plaintiff's action.

5. In the second paragraph of said seventh subdivision, plaintiff sets up statements as to appeals to the County Commissioners and

to the Territorial Board of Equalization, and the grounds of such appeals, which are immaterial and impertinent, and are matters of argument, and not allegations of fact.

6. The said complaint nowhere sets up what is the real value of the shares of stock and property of plaintiff.

7. The said complaint in the eighth subdivision thereof, beyond the allegation of the fact of the payment by plaintiff of the sum of $5,224.50, contains nothing but the allegation of conclusions of law, instead of matters of fact.

8. The allegations in the ninth subdivision of said complaint, as to the proceedings in cause No. 6603, and the threatened action on the part of the defendants, are entirely immaterial and unimportant as the basis of plaintiff's action.

9. The allegations contained in the 10th subdivision of the complaint set forth conclusions of law, and not matters of fact.

10. The allegations in the 11th subdivision of said complaint, as to the method of valuation adopted by the assessor, in the assessment of property other than bank stock, and in the assessment of bank stock, furnish no ground of action or relief for plaintiff.

11. The allegations in the second paragraph of the 11th subdivision of the complaint are principally of conclusions of law, and are wholly immaterial and unimportant.

12. The allegations of the 12th subdivision of the complaint are almost entirely of conclusions of law, which are in-
14 correct and can furnish no foundation for plaintiff's action.

13. Said complaint in the 12th subdivision thereof asserts that any additional assessment or re-assessment, the making of which is sought to be enjoined, would be entirely void.

Wherefore defendants pray judgment of the said complaint and as to whether they are bound to make any other or different answer thereto.

F. W. CLANCY,
District Attorney.

Endorsed: "Filed in my office this October 19, 1904. W. E. Dame, Clerk."

And thereafter, on, to-wit, the 17th day of December, 1904, there was entered of record in the office of said Clerk, in said cause, a Final Judgment, which said Final Judgment is in words and figures following, to-wit:

In the District Court of the County of Bernalillo, Territory of New Mexico.

No. 6640.

FIRST NATIONAL BANK OF ALBUQUERQUE, Plaintiff,
vs.
GEO. F. ALBRIGHT, FRANK A. HUBBELL, and FRANK W. CLANCY, Defendants.

Final Judgment.

On this 21st day of November, 1904, this cause came on to be heard upon the demurrer of the defendants to plaintiff's complaint, and was argued by counsel and submitted to the court, McMillen and Raynolds appearing for the plaintiff and Frank W. Clancy for the defendant.

15 Whereupon, the Court being fully advised in the premises, finds that said demurrer ought to be overruled.

It is therefore, ordered, adjudged and decreed that said demurrer be, and the same hereby is overruled.

And thereupon, the said defendants, not wishing to further plead, but electing to stand upon said demurrer, the court finds that the allegations of said complaint are true, and that the said plaintiff is entitled to the relief prayed for in said complaint.

It is therefore, ordered, adjudged and decreed that the balance claimed to be due on account of the raise and change in the assessment of the property of said plaintiff for the year 1903, be, and the same hereby is declared illegal and void, and the defendant, Frank A. Hubbell, as Treasurer and *ex-officio* Collector be, and he hereby is directed to cancel the same upon his books.

It is further ordered, adjudged and decreed that the said defendants, George F. Albright, as Assessor, and Frank A. Hubbell, as Collector, be, and they hereby are enjoined and forever restrained from re-assessing or making additional assessments of any of the property of said bank or any of its shares of stock for the year 1903.

It is further ordered, adjudged and decreed, that the said plaintiff recover from said defendants their costs herein to be taxed, for which execution is awarded.

And thereupon came the defendants by Frank W. Clancy, their attorney, and pray an appeal from the judgment of the Court to the Supreme Court of the Territory of New Mexico.

And thereupon the court grants said appeal.

And now it appearing to the court that the foregoing judg-
16 ment was duly rendered on the 21st day of November, 1904, but has not been entered of record, it is ordered, adjudged and decreed that said judgment be entered *nunc pro tunc.*

(Signed) FRANK W. PARKER,
Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Third Judicial District thereof.

Endorsed: "Filed in my office this December 17th, 1904. W. E. Dame, Clerk."

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TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court.

I, W. E. Dame, Clerk of the District Court of the Second Judicial District, Territory of New Mexico, hereby certify the foregoing to be a true, correct and perfect transcript of the proceedings in the case of the First National Bank of Albuquerque, *vs.* Geo. F. Albright, *et al.*, as same remains of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of May, 1905.

[SEAL.] W. E. DAME, *Clerk.*

17 And Afterwards, *on* to wit, on the third day of January, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors, in the above entitled cause, which said assignment of errors was and is in figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellees,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Now come the appellants and say that there is manifest error in the proceedings and judgment of the court below, and assign the following as such errors:—

1. The court erred in overruling the demurrer to the complaint.
2. The Court erred in granting plaintiff the relief prayed for.
3. The court erred in enjoining defendant Hubbell as collector from re-assessing or making additional assessments of the property or shares of stock of plaintiff for the year 1903.

Whereof appellants pray that the judgment of the court below be reversed, set aside and altogether held for naught, and that this cause be remanded with directions to sustain the demurrer to the complaint.

(Signed) FRANK W. CLANCY,
Attorney for Appellants.

18 Which said assignment of errors is endorsed as follows to wit:—"No. 1097,—First National Bank of Albuquerque, appellee, *vs.* George F. Albright *et al.*, Appellants—Assignment of errors—Filed in my office this Jan. 3, 1906, Jose D. Sena, Clerk."

And *Heretofore*, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1906, the same being the third day of January, A. D., 1906, on the fourth day of the said regular term, the same being Monday the 8th day of January, the following among other proceedings were had and entered of record, following to wit:—

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

It is ordered by the court that this cause be and the same hereby is set for hearing for the twelfth day of January, 1906.

And Afterwards, *on* to-wit, on the eighth day of the said regular term the same being Friday, the 12th day of January, the following among other proceedings were had and entered of record, following to wit:—

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellant-.

Appeal from District Court, Bernalillo County.

It is ordered by the court that this cause, be and the same
19 hereby is set for hearing for Wednesday, the 17th day of January, A. D., 1906.

And Afterwards, *on* to wit, on the Eleventh day of the said Regular term, the same being Wednesday, the seventeenth day of January, A. D., 1906, the following among other proceedings were had and entered of record, following to wit:—

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by F. W.

Clancy, Esq. for appellants, and A. B. McMillen, Esq. for appellee, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, *on* to wit, on the twenty-ninth day of the said regular term, the same being Friday, June 29th A. D. 1906, the following among other proceedings were had and entered of record, following to wit:—

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court, on a former day of the present term, and the court being now sufficiently advised in the
20 premises announced its decision by Chief Justice Mills, Associate Justice- Parker, McFie, Mann and Pope, concur-ing, reversing the judgment of the court below, and remanding this cause to the said District Court with instructions to dismiss the complaint, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Bernalillo whence this cause came into this court, be and the same hereby is reversed and this cause hereby is remanded to the said district court with instructions to dismiss the complaint, It is further adjudged and decreed by the court that the said appellants do have and recover of and from the appellee herein, their costs in this behalf expended for which execution may issue.

And Afterwards, *on* to wit:—on the twenty-eight day of August, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the Supreme Court of the United States, which said assignment of errors was and is as follows to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Comes now the appellee and being dissatisfied with the final judgment of the court in said cause and desiring to appeal to the Supreme Court of the United States, assigns error as follows:—

The court erred in reversing the judgment of the District
21 Court and remanding said cause with instructions to dismiss the complaint.

(Signed) McMILLEN & RAYNOLDS,
Attorneys for Appellee.

Which said assignment of errors was and is endorsed as follows, to-wit "No. 1097,—In the Supreme Court of the Territory of New Mexico,—First National Bank of Albuquerque, Appellee *vs.* George F. Albright, *et al.*, Appellants—Assignment of errors—Filed in my office this Aug. 28, 1906, Jose D. Sena Clerk."

And Afterwards, *on* to wit, on the 28th day of August, A. D. 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a petition for appeal to the Supreme Court of the United States, which said petition for appeal to the Supreme Court of the United States, was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Comes now the appellee and complaining of the final judgment rendered in said cause reversing the judgment of the District Court and remanding said cause with instructions to dismiss the complaint, hereby appeals from said final judgment, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith.

Wherefore said appellee prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon
22 which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 28th day of August, 1906.

(Signed) McMILLEN & RAYNOLDS,
Attorneys for Appellee.

Which said petition for appeal was endorsed as follows to wit: "No. 1097, In the Supreme Court of the Territory of New Mexico,—First National Bank of Albuquerque, appellee, *vs.* Geo. F. Albright, *et al.*, appellants—Petition for Appeal—Filed in my office this Aug. 28, 1906, Jose D. Sena, Clerk,—McMillen & Raynolds, Attorneys for appellee, Albuquerque, N. M."

And Afterwards, *on* to-wit:—on the thirtieth day of the said regular term of the supreme court, the same being Tuesday the twenty-eighth day of August, the following among other proceedings were had and entered of record, following to wit:—

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Upon application of the appellee in the above entitled cause, and it appearing to the court that the said appellee has duly filed its assignment of errors and prayed an appeal, It is hereby ordered that the appeal of said cause to the Supreme Court of the United States, be, and the same hereby is allowed. Said appeal being prayed for and allowed in open court at the same term that said final judgment was rendered.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

23 And Afterwards, *on* to wit, on the 5th day of September, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an appeal Bond, in the above entitled cause, which said appeal bond was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Appeal Bond.

Know all men by these presents, that the First National Bank of Albuquerque, as principal and M. W. Flournoy and A. B. McMillen as sureties, are held and firmly bound unto George F. Albright, Frank A. Hubbell and Frank W. Clancy, in the penal sum of Five Hundred Dollars for the payment of which we bind ourselves, our heirs, executors, administrators and successors.

Sealed with our seals and dated this 29th day of August, 1906.

The condition of this obligation is such that whereas the said First National Bank of Albuquerque has taken an appeal from

the decision of the Supreme Court of the Territory of New Mexico, in the above entitled cause to the Supreme Court of the United States, to reverse the judgment entered in said cause reversing the judgment of the District Court and remanding said cause with instructions to dismiss plaintiff's complaint.

Now, therefore, if the said First National Bank of Albuquerque shall prosecute said appeal to effect and shall pay all costs adjudged against it if it fails to make its plea good, then the
24 above obligation to be void, otherwise to be and remain in full force and virtue.

FIRST NATIONAL BANK OF ALBUQUERQUE, N. M.,

(Signed) By M. W. FLOURNOY, *Vice Pr.* [SEAL.]
M. W. FLOURNOY. [SEAL.]
A. B. McMILLEN. [SEAL.]

Sealed and delivered in the presence of
(Signed) H. F. RAYNOLDS.
(Signed) HARRIET MAYFIELD.

TERRITORY OF NEW MEXICO, *County of Bernalillo, ss:*

On this 29th day of August, 1903, before me a notary public within and for said county, personally appeared M. W. Flournoy, to me known, who being first duly sworn did say that he is the Vice President and Manager of the First National Bank of Albuquerque; that the seal affixed to said Bond is the corporate seal of said corporation and that said bond was signed and sealed in behalf of said First National Bank of Albuquerque by authority of its board of directors, and said M. W. Flournoy acknowledged said instrument to be the free act and deed of said First National Bank of Albuquerque.

Also appeared M. W. Flournoy and A. B. McMillen to me known to be the persons described in the foregoing bond as sureties and who executed the same and acknowledged that they executed the same as their free act and deed.

And the said M. W. Flournoy and A. B. McMillen being by me first duly sworn say, each for himself and not one for the other, that he is worth the penalty of the above bond over and above all debts and exemptions.

HARRIET MAYFIELD,
Notary Public.

[SEAL.]

The foregoing bond approved as to form, penalty and sufficiency of surety.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

25 Which said appeal bond was and is endorsed as follows "No. 1097,—In the Supreme Court of the Territory of New Mexico,—First National Bank of Albuquerque Appellee *vs.* George F. Albright, *et al.* appellants,—Appeal Bond—Filed in my office

this Sept. 5th, 1906, Jose D. Sena, Clerk—McMillen & Raynolds attorneys for appellee Albuquerque N. M."

And Afterwards, on to wit, on the 10th day of September, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a Waiver of Citation, which said waiver of citation was and is in words and figures following to-wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants.

Appeal from District Court, Bernalillo County.

Waiver of Citation.

The undersigned, George F. Albright, Frank A. Hubbell and F. W. Clancy, by F. W. Clancy, their attorney, hereby waive the issue and service of citation on the appeal taken from the Supreme Court of the Territory of New Mexico, to the Supreme Court of the United States.

(Signed) FRANK W. CLANCY,
Attorney for George F. Albright, Frank A. Hubbell, and F. W. Clancy.

Which said waiver of citation was endorsed as follows: "No. 1097—In the Supreme Court of the Territory of New Mexico,—First National Bank of Albuquerque, appellee, *vs.* George F. Albright, *et al.*, appellants—Waiver of Citation—Filed in my office this Sept. 10th 1906, Jose D. Sena, Clerk,—McMillen & Raynolds Att'ys for appellee."

26 And Heretofore, *on* to-wit:—on the twenty-ninth day of June, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico an opinion by the court in the above entitled cause, which said opinion by the court was and is in figures following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1097.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee,
vs.
GEORGE F. ALBRIGHT ET AL., Appellants,

Appeal from District Court, Bernalillo County.

Syllabus.

1. Assessments of the capital stock of a National Banking Association must be made against each individual shareholder and not as a whole against the bank.
2. Real estate owned by a National Banking Association, must be assessed against the bank, but it must not be assessed at a higher percentage than other real estate of the same class and character situated in the county and municipality where the tax is sought to be levied.
3. In the case at bar, it was error to restrain the assessor and Collector of Bernalillo County, from making a new and additional assessment of the capital stock and property of the bank, for until the assessment is made, it cannot be determined whether or not it is a proper one.

Statement of Facts.

The First National Bank of Albuquerque is a corporation organized under the National Banking act, and does a banking business in the city of Albuquerque.

27 At the time referred to in the complaint, George F. Albright, was assessor and Frank A. Hubbell, was treasurer and *ex-officio* collector of Bernalillo County, in which county Albuquerque is situated, and Frank W. Clancy, was district attorney of the second Judicial District.

In April 1903, the First National Bank of Albuquerque made a return of its property for purposes of taxation for that year, fixing a total valuation thereon of ninety thousand dollars.

On June 2nd 1903, Albright under the direction of the county commissioners raised and changed the assessment returned by the bank, so as to assess the capital stock, surplus and real estate separately. Neither the return made by the bank, nor the assessment made by Albright comply with the requirements of the statutes. From the assessment made by Albright the bank appealed to the county commissioners, and then to the Territorial Board of Equalization, but secured no relief.

When the taxes for 1903 became due, the bank paid the same on the basis of the return it had made, and the treasurer of Bernalillo

county received the same on account, but without waiving his right to collect the full amount claimed to be due.

In June 1904, the appellant Clancy, as district attorney, commenced suit in the district court against the bank to collect the taxes claimed to be due on the Albright assessment, above the sum already paid by the bank, and also a penalty of five per cent.

To the complaint in this suit the bank demurred and the district attorney confessed the demurrer, and the suit was dismissed.

The bank then filed a complaint, and asked for an injunction to prevent any further or additional assessment of its property of shares of stock for the year 1903, and also that the change in the assessment made by Albright be declared illegal and void, and that the treasurer and *ex-officio* collector, be directed to cancel the same upon his books, by order of the court.

28 To the complaint a demurrer was filed, argued and overruled, and the defendant declining to plead further, the court decreed that the balance claimed to be due on account of the Albright assessment was illegal and void, and the defendant Hubbell was directed to cancel the same upon his books and the defendants Albright and Hubbell were enjoined from re-assessing or making additional assessment on any property of the bank or its shares of stock for the year 1903.

From this judgment and decree defendants appealed.

Opinion of the Court.

MILLS, *C. J.:*

This action was brought on the equity side of the court, and as a result of the decree entered by the trial court, the assessor and collector of Bernalillo county were restrained from re-assessing or making additional assessments on any of the property of the First National Bank, or any of its shares of stock for the year 1903.

An examination of the complaint shows that both the return, made by the bank and the assessment made by the Assessor, Albright, are incorrect and do not comply with the requirements of the statutes of this Territory; the return made by the bank returns the shares of stock *in solido*, and not to the several owners, as required by Sec. 257, Compiled Laws of 1897; nor is the actual cash value of said stock set out, as is also required by said Sec. 257; each parcel of real estate is not listed and valued separately, but the whole, including the stock and surplus of the bank, is valued in bulk. The assessment sought to be made by the assessor Albright, also assesses the stock *in solido*, and does not attempt to set any actual cash value on such stock.

It appears from the complaint that the capital stock of the bank, at the time Albright attempted to make his assessment was $200000 and its surplus in March 1903, was $24/634. The total of the return made by the Bank and which included capital, surplus and real estate was $90,000.—while the assessment as made by the Assessor, acting under the direction of the board of county commissioners was $150,542.00.

29 The principal points in this case are that assessments made in Bernalillo county are not uniform and that property other

han banks is only assessed at one-third of its real value, and that hus a discrimination is made against the banks, which are assessed ccording to a ruling of the Territorial Board of Equalization at the ate of 60% of the par value of its capital stock and surplus, and that f shareholders of banks are taxed at the rate of 60% of the par value f their stock and surplus, that there must be deducted from the mount so found due, the value of the real estate owned by the bank.

That the Territorial Board of Equalization had the power to fix he valuation of 60% as that at which the capital stock and surplus f banks shall be assessed, has been expressly decided, by this court, n the case of the Territory of New Mexico, *vs.* First National Bank f Albuquerque, 10 N. M., 285, and we see no reason to make any hange in, or recede from the position taken by this court in deiding that case. It may be possible that in some, and perhaps many ases in the Territory, real estate is assessed at a lower rate than 60% f its actual value, and we also know from experience and observaion that in many cases personal property which is represented by ash, stocks, bonds, and other forms of indebtedness, is not listed y their owners and escapes taxation altogether, but this would be no eason to say that, because this class of property was not taxed that ank stocks and real estate should also be exempted from taxation. Assessors, like other human beings, are liable to err. The mere fact hat one class of property is assessed at a higher percentage of its alue than other classes does not vitiate an assessment. As has been ell said, "to make the valuation of one class of property depend pon the extent of the violation by assessors of the duty required of hem by law in respect to another description of taxable property, ould be a recognition and sanction of such violations of duty, hich we would not impute to the legislature unless declared in the ost unequivocal terms." People *vs.* Supervisors, 60 N. Y., 385.

Congress has given states and territories the authority to tax national banks. The permission is given in Sec. 5,219, f the Revised Statutes of the United States, which reads as follows: "Nothing herein shall prevent all the shares in any association from eing included in the valuation of the personal property of the wner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the egislature of each state may determine and direct the manner and lace of taxing all the shares of national banking associations located ithin the state, subject only to two restrictions, that the taxation hall not be at a greater rate than is assessed upon other moneyed apital in the hands of individual citizens of such state, and that he shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank s located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county r municipal taxes, to the same extent, according to its value, as ther real property is taxed."

Although the word *"State"* is used in this act, it is held that the

same power to tax national banks exists in the Territories or in the States. Talbott *vs.* Silver Bow County, 139, U. S. 446.

The taxing power cannot go outside of this act of Congress and tax national banking associations otherwise than as therein provided.

There is nothing in the complaint to show that the proposed action of the defendants conflicts with this act of congress. The Complaint does not allege that the assessment would be at a greater percentage than is assessed upon moneyed capital in the Territory. Such capital, no matter in what invested, is treated uniformly and equally by the territorial board of equalization. There is no restriction in the act of congress saying that the capital of a bank shall be assessed at the same percentage of value as real estate. As said by the Supreme Court of the United States, in speaking of Sec.
31 5219, Rev. Statutes Sec. 5219, respecting State taxation of shares in National Banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money, as in banking, as that business is defined in the opinion of the court." Talbott *vs.* Silver Bow County, 139 U. S., 438.

Let us suppose that the bank in question in order to protect itself had to take real estate outside of this Territory,—perhaps in Arizona. If such was the case, there can be no doubt but that the authorities of Arizona would tax such real estate, and when the assessor of the county in this Territory where the bank is situated, came to assess the stock of the shareholders of such bank, could the bank reply, Our shareholders owe you nothing; we have deducted from the assessment value of their stock the value of the real estate we own in Arizona, and there is nothing coming to you? Assuredly not. It would be absurd to make such a contention.

A bank is different from the stock held by its shareholders. The shareholders can be taxed upon their stock according to the laws prescribed by the sovereign, and the bank itself can be taxed upon the real estate owned by it. This power is given by act of Congress Sec. 5219, Revised Statutes of the United States.

The act of congress above referred to clearly allows taxes to be levied upon the real estate belonging to National Banking associations. The English Language does not contain words which gives this right more plainly than those employed by the framers of the act; "Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." The Supreme Court of the United States says, "This section, then, of the Revised Statutes, is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the
32 shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void."

"So self-evident are these conclusions that the adjudicated cases justify the deduction that they have been accepted from the beginning as asiomatic and unquestioned." Owensboro National Bank *vs.* Owensboro, 174, U. S., 664.

It must however be borne in mind that the real estate of National Banking associations, must not be assessed at a higher percentage than other real estate of the same class and character situated in the county and municipality where the tax is sought to be levied.

Another question is however presented in this case other than those we have above discussed, and that is, should the demurrer interposed to the complaint by the defendants in the trial court have been overruled, and an injunction granted restraining the defendants George F. Albright, as Assessor, and Frank A. Hubbell, as collector, from re-assessing or making additional assessments on any of the property of the First National Bank of Albuquerque, or any of its shares of stock for the year 1903?

Assessors and Collectors, under the laws of this Territory have the right to make additional assessments. This power is given by sections 4055 and 4056 of the Compiled Laws of 1897, and as the return made by the Bank, as well as the assessment made by the assessor, were incorrect, and did not comply with the laws of the Territory, the assessor has the authority to make a new and correct assessment. Granted that he has this authority, then the injunction issued by the learned trial court, was improvidently issued, and should be vacated. Until the assessment is made and a tax levied thereon, no one is injured, and suit will not lie. It may be that the officer finds other property, owned by the bank which had not been returned for taxation, and if such is the case, it would
33 be manifestly improper for any court to hold that the assessor could not assess the same, and enjoin him from so doing, as until the assessment is made no one can determine whether or not it is a proper one.

For the reasons stated above, the cause is reversed and remanded to the district Court of Bernalillo County, with instructions to dismiss the complaint, and It is so ordered.

WILLIAM J. MILLS,
Chief Justice, etc.

We Concur:
FRANK W. PARKER, *A. J.*
JOHN R. McFIE, *A. J.*
EDWARD A. MANN, *A. J.*
WM. H. POPE, *A. J.*

Abbott, A. J., took no part in this decision.

Which said opinion was and is endorsed as follows to wit:—"No. 1097—In the Supreme Court of the Territory of New Mexico,—January Term, 1906?—First National Bank of Albuquerque, N. M. Appellee, *vs.* George F. Albright, *et al.*, Appellants.—Appeal from District Court Bernalillo County,—Opinion,—Mills C. J.,—Filed in my office this Jun- 29, 1906, Jose D. Sena, Clerk."

34 TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing thirty-three pages contain, a true, full and complety transcript of the record, proceedings, pleadings and opinion had in a certain cause latele pending in the Supreme Court of the Territory of New Mexico and entitled First National Bank of Albuquerque Appellee *vs.* George F. Albright *et al.*, appellants numbered 1097, as the same appear of record in the book of proceedings of this court and as the same remain on file in my office.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 20th day of September, A. D., 1906.

[Seal Supreme Court, Territory New Mexico.]

JOSE D. SENA,
Clerk Supreme Court of N. M.

Endorsed on cover: File No. 20,399. New Mexico Territory supreme court. Term No. 123. The First National Bank of Albuquerque, appellant, *vs.* George F. Albright, Frank A. Hubbell, and F. W. Clancy. Filed October 3d, 1906. File No. 20,399.